INDEX.

INDEX OF CASES CITED.

INDEX TO APPENDIX.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1924.

OZARK PIPE LINE CORPORATION, *Appellant*,

vs.

ROY MONIER and GEORGE M. HAGEE, constituting the State Tax Commission of the State of Missouri, and JESSE W. BARRETT, Attorney-General of the State of Missouri, *Appellees*.

No. 575.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

BRIEF OF THE ARGUMENT FOR APPELLEES.

STATEMENT.

The president, two vice-presidents, secretary, treasurer, general manager, tax commissioner, bookkeepers, stenographers and other employees maintain their offices and headquarters in their offices in

St. Louis, Missouri, where local and long distant telephones are maintained and the name of the company appears on the doors of said offices. The secretary is there in charge of the records and books of account; the stock certificate books of the company, sales and transfers of stock made by the company are issued from that office where record is made and kept thereof. The treasurer has custody of the cash of the company which maintains its accounts on deposit in St. Louis (Record p. 19); none of the directors or officers of the company are in Maryland and, with the exception of one director living in New York, the other directors and officers live in St. Louis (Record p. 27). All the pay checks are made out at the St. Louis office and distributed therefrom (Record p. 26). The office in Maryland where its corporate life arose, referred to as the home office, is merely an office required by the statutes of that state where legal service upon the company may be had, and is occupied only by an agent of the corporation (Record, pp. 18-19).

In addition to the above the company purchases supplies within the state; employs labor within the state; maintains and operates telephone and telegraph lines and purchases supplies and equipment therefore in the state; maintains and operates automobiles and trucks within the state for the purpose of transporting men and material. The mechanical work, maintenance and repairs of said trucks are

made at local garages in the state wherever most convenient (Record pp. 25-26); acquires rights-of-way, both by purchase and condemnation under its right of eminent domain granted to it by the State (Record p. 26). Frequent damage cases arise by reason of broken and leaking pipe lines which result in overflowing and damaging the lands adjacent thereto. Settlements and adjustments thereof are effected both in and out of the state courts (Record, p. 21). Material and labor are assembled at the broken points and repairs made, the material necessary therefor being kept nearby (Record, p. 20).

At the office in Oklahoma are stationed the superintendent of operations, his assistants, the master mechanic, chief engineer, gaugers and station employees, all of whom are directed in their duties by the officers of the company from their office in St. Louis, Missouri (Record, pp. 19-20).

In addition to the foregoing activities in the State of Missouri, the plaintiff maintains telephone and telegraph lines over which they transmit telegrams and telephone messages (Record, p. 25).

The statutes forming the basis and relating to this cause are correctly set out in appellant's brief (pp. 17-38).

The question presented to the lower court for determination, as set out in the pleadings and evidence, was whether or not the appellant, Ozark Pipe Line Corporation, a foreign corporation, and

a common carrier, engaged, among other things, in transporting crude oil or petroleum from the State of Oklahoma across the State of Missouri to a point in Illinois, is "doing business" in this State, under the terms of the Franchise Tax Act set out in appellant's brief (pp. 17-38).

It was conceded in the lower court, and is likewise conceded here, that if this corporation is and was engaged *solely* in interstate commerce and is and was not "doing business" in Missouri, as above stated, that it is not subject to the payment of a Franchise Tax in Missouri. On the other hand, if it is and was "doing business" in Missouri within the purview of the aforesaid Franchise Tax Statutes, it is subject to a Franchise Tax based upon "that proportion of its entire capital stock and surplus that its property and assets in this State bear to all its property and assets wherever located." (Section 9836, R. S. 1919; as amended, Laws of Missouri, 1921, page 121, as set out in appellant's brief, pp. 29-30.)

The trial court, after a full hearing, found the facts to be that appellant was "doing business" in Missouri, and thereupon dismissed its bill. From this decree plaintiff appealed.

POINTS AND AUTHORITIES.

I.

INTERSTATE COMMERCE DEFINED.

Interstate commerce is a "practical conception," and the tax in question to be valid must not, in its *practical effect* and *operation*, burden interstate commerce.

Eureka Pipe Line Company vs. Hallanan, 257 U. S. 265, l. c. 272;

Hump Hairpin Manufacturing Company vs. Emmerson, 258 U. S. 290, l. c. 295;

St. Louis S. W. Ry. vs. Arkansas, 235 U. S. 350, l. c. 362.

II.

CORPORATIONS DOING BOTH INTERSTATE AND INTRASTATE COMMERCE MAY BE REQUIRED TO PAY A FRANCHISE OR EXCISE TAX.

While a state may not use its taxing power to regulate or burden interstate commerce, on the other hand, it is settled that a state excise tax which affects such commerce, not directly but only indirectly, and remotely, may be entirely valid, where it is clear that it is not imposed with the covert purpose or with the effect of defeating Federal Constitutional rights.

Hump Hairpin Manufacturing Company vs. Emmerson, 258 U. S. 290, l. c. 295;

Maine vs. Grand Trunk R. Co., 142 U. S. 217, l. c. 227-28;

U. S. Express Co. vs. Minnesota, 223 U. S. 335, l. c. 344-5, 7-8;

Baltic Mining Co. vs. Massachusetts, 231 U. S. 68, l. c. 83-88;

Kansas City, M. & B. R. Co. vs. Stiles, 242 U. S. 111, l. c. 118-120;

Kansas City, etc., Ry. vs. Kansas, 240 U. S. 227, l. c. 231-35;

U. S. Glue Co. vs. Oak Creek, 247 U. S. 321, l. c. 326-29;

Schwab vs. Richardson, 44 Supreme Court Reporter, No. 4 (December 15, 1923) 60, l. c. 62.

III.

THE MISSOURI FRANCHISE TAX ACT.

This act has been held by this Court not to be a burden on interstate commerce.

St. Louis-San Francisco Ry. vs. Middlekamp, 256 U. S. 226, l. c. 231.

IV.

"DOING BUSINESS" DEFINED.

What is "doing business" by a foreign corporation in a State other than that of its incorporation? The answer to this question constitutes the sole controversy presented here.

The evidence shows and the trial court found that the plaintiff maintains its principal office in Missouri, in the City of St. Louis, where it keeps its stock certificate books, books of account, financial reports, bank accounts, pays all the employees, both within and without the state, purchases supplies within the state, employs labor within the state, maintains and operates telephone and telegraph lines and purchases supplies and equipment therefor in this state, acquires rights-of-way both by purchase and condemnation under its right of eminent domain granted to it by the state. It is constantly entering into and executing contracts for the transportation of crude oil, and of employment and purchases, and has frequent damage cases by reason of broken and leaking pipe lines which result in overflowing and damaging the lands adjacent thereto. Settlements and adjustments of such damages are effected both in and out of the courts of this state. Material and labor are assembled at the broken points and repairs made.

The vice-president, secretary, treasurer and other officers maintain their offices and headquarters in their offices in St. Louis, where telephones are maintained and the name of the company appears on the doors of said offices. Stockholders and directors meetings are held there. All certificates for the receipt of oil for transportation are sent to the St. Louis office where the revenue for said transportation is figured and entered of record. The tariff rates are also kept there and in fact the entire business of the corporation is managed and directed from the St. Louis office.

The court remarked that these facts were not traversed and were not susceptible of contradiction in any substantial particular (Record, p. 44).

In view of the foregoing evidence and finding of facts and the following decisions, appellees contend that the decree of the lower court should be affirmed.

Cheney Bros. Co. vs. Massachusetts, 246 U. S. 147, l. c. 152-8;

Knights Templars Indemnity Co. vs. Jarman, 187 U. S. 197, l. c. 204;

Horn Silver Mining Co. vs. New York, 143 U. S. 305, l. c. 317;

Board of Trade vs. Hammond Elevator Co., 198 U. S. 424, l. c. 441-2;

Diamond Glue Co. vs. U. S. Glue Co., 187 U. S. 611, l. c. 613;

Connecticut Mutual Life Insurance Co. vs. Spratley, 172 U. S. 602, l. c. 610-11;
Mutual Reserve Life Insurance Co. vs. Birch, 200 U. S. 612.

For the convenience of the court we set out, in appendix hereto, a list of citations to various state court decisions in which they recite facts held by them to constitute "doing business," by foreign corporations within their respective states.

V.

FINDINGS OF FACT.

A finding of fact by a chancellor, who heard the witnesses, will not be reversed, except in a clear case

Unkle vs. Wills, 281 Fed. 29, l. c. 36;
United States vs. United Shoe Mach. Co., 247 U. S. 32, l. c. 53;
Butte and Superior Co. vs. Clark-Montana Co., 249 U. S. 12, l. c. 30;
Fay vs. Hill, 249 Fed. 415, l. c. 418;
Hamlin et al. vs. Grogan, 257 Fed. 59, l. c. 60.

VI.

BURDEN OF PROOF.

The burden of proof rests upon appellant.

Maxwell Land Grant Co. vs. Dawson, 151 U. S. 586, l. c. 604.

ARGUMENT.

I.

Interstate commerce is held by this Court to be "a practical conception," and that a state tax levy upon a foreign corporation doing business within a state, to be valid, must not, in its *practical effect* and *operation*, burden interstate commerce.

Eureka Pipe Line Co. vs. Hallanan, 257 U. S. l. c. 272.

II. III.

Applying this rule in the case at bar, it will be found, it is submitted by appellees, that the Act in question is not a "burden on interstate commerce" in its *practical effect*, as defined by this Court. The tax is not in anywise based upon receipts of the plaintiff from interstate commerce and the amount thereof is not made to fluctuate with the volume or value of the business done, nor does it apply to the value or use of any property belonging to the appellant located beyond the limits of the State of Missouri, nor to the occupation or business of carrying on interstate commerce. As a matter of fact, this Court has held that the Missouri Franchise Tax Act in question is not a burden on interstate commerce.

St. Louis-San Francisco Ry. vs. Middelkamp, 256 U. S. l. c. 231.

IV.

The question here for determination, is and was the appellant engaged in "doing business" in Missouri within the purview of the Missouri Franchise Tax Law?

At the outset we wish to call the Court's attention to the interpretation put upon the nature and character in respect of its business done in Missouri by the appellant itself.

Section 9792, R. S. of Mo., 1919, as set forth in the appendix of appellant's brief, page 75, requires that:

> "Every company incorporated for the purpose of gain under the laws of any other state, territory or country, now or hereafter doing business within this state, shall file in the office of the secretary of state a copy of its charter or articles of association, duly authenticated by the proper authority, together with a sworn statement under its corporate seal, particularly setting forth the business of the corporation which it is engaged in carrying on, or which it proposes to carry on in this state; and the principal officer or agent in Missouri shall make and forward to the secretary of state, with the affidavits required, a statement sworn to of the proportion of the capital stock of said corporation which is represented by its property located

> and business transacted in Missouri, which statement shall set out the location of its principal office or place in this state for the transaction of its business, where legal service may be obtained upon it."

In pursuance of its intent and desire to do business in Missouri, under the foregoing statute, the appellant filed in the office of the Secretary of State of the State of Missouri, on or about the 5th day of January, 1920, an affidavit executed by Mr. T. F. Lydon, then its principal officer in Missouri, seeking permission to do business in Missouri. In this affidavit it is recited:

> "That the amount of capital stock of said corporation is $10,400,000.00 and the proportion of the capital stock of said corporation which is represented by its property located and business transacted in the State of Missouri is $5,319,201.90, * * *."

and further recited:

> "That the principal office of said corporation or place of transaction of its business in the State of Missouri is located in the Arcade Building, 8th and Olive Streets, St. Louis, Missouri. (Defendant's Exhibit 1. Record, p. 40.)

Attention is here called to an error in the abstract of the record (p. 40) in referring to this Exhibit as "Plaintiff's Exhibit 1." It should read "Defendant's Exhibit 1."

Subsequently, on or about the 23rd day of October, 1920, appellant increased its capital stock, and thereafter, on or about the 17th day of August, 1921, filed in the office of the Secretary of State of the State of Missouri its affidavit stating:

> "That the present total authorized capital stock of said corporation is $30,000,000.00; that the amount of property and business of said corporation in the State of Missouri is $12,720,000.00; that said corporation has previously qualified in the State of Missouri for $5,319,201.91, and that $7,400,798.09, in addition thereto, is now represented in the State of Missouri" (Record p. 41).

In paragraph 12 of Section C of appellant's Articles of Association (Record p. 32) appears the following recital:

> "It is the intention that the objects and purposes specified in the foregoing clauses of this Article C shall not, unless otherwise specified herein, be in anywise limited or restricted by reference to or inference from, terms of any other clause of this or any

other article of this Certificate, but that the objects and purposes specified in each of the clauses of this Article shall be regarded as independent objects and purposes."

Clause one relates to pipe line and transportation of petroleum. An independent object and purpose.

Clause two relates to acquiring, maintaining, operating and disposing of telegraph and telephone lines. An independent object and purpose.

Clause three pertains to the business of engaging in and carrying on the business generally, of dealing in and transporting goods, wares and merchandise of every description. Another independent object and purpose.

Clause six authorizes, as an independent object and purpose, the business of transportation (aside from that of petroleum).

There is evidence in the record of maintaining and operating telegraph and telephone lines and of transporting goods and wares by auto trucks and other business activities in connection therewith. These, under the terms of appellant's charter, are separate and independent lines of business from that of transporting petroleum, and was so found by the trial court (Record, p. 43).

In view of the fact that a foreign corporation may go into another state without obtaining leave

or license of the latter for all legitimate purposes of interstate commerce (Crutcher vs. Kentucky, 141 U. S. 47, l. c. 58), it is quite significant that appellant has seen fit to domesticate under the Laws of Missouri. If it did not intend to do any intrastate business, then why domesticate in the first instance, and why file an additional affidavit setting forth the amount of its property and business in Missouri in a second affidavit after increasing its capital stock?

The most reasonable construction to be placed upon these acts of the appellant is that it regarded and treated many of the activities it is now and has been engaged in within the State of Missouri as intrastate commerce.

In this connection the remarks of this Court in the case of Pennsylvania R. R. Co. vs. Knight, 192 U. S., at page 28, used the following argument:

> "As shown in the opinion from which we have just quoted many things have more or less close relation to interstate commerce which are not properly to be regarded as a part of it. If the cab which carries the passengers from the hotel to the ferry landing is engaged in interstate transportation, why is not the porter who carries the traveler's trunk from his room to the carriage also so engaged? If the cab service is interstate transportation, are the drivers of the cab and the dealers who supply hay and grain for the horses also

engaged in interstate commerce? And where will the limit be placed?

"We are of the opinion that the cab service is an independent local service preliminary or subsequent to any interstate transportation, and, therefore, the judgment of the Supreme Court of the State of New York was correct, and it is affirmed."

Appellant, in its brief (p. 47), challenges the correctness of the ruling of the lower court in the case at bar and argues that the decision was based upon a misapprehension of the cases upon which the ruling was based, namely, Copper Range Co. and Champion Copper Co. vs. Mass., reported in Cheney Brothers Co. vs. Mass., 246 U. S. 147. We must take issue with appellant in this regard. The Copper Range Company v. Mass. case, which was affirmed by this Court, was decided in favor of Massachusetts by the Supreme Judicial Court of Massachusetts and reported in the 218th Mass. at page 576. The facts as there set out show that the Copper Range Company was organized under the laws of Michigan and was a holding company whose chief asset was stock in a foreign copper mining corporation and also stock and bonds of a Michigan railroad and certain mineral lands. It transacted no commerce either in Boston or elsewhere. Its activities in Massachusetts consisted in receiving monthly dividends

from stock in foreign corporations and depositing them in Boston banks and the payment of these receipts, less officers' salaries and expenses, to its stockholders by way of dividends. Its directors' meetings were held three or four times a year in Boston and its annual stockholders' meetings were also held there. It declared and paid dividends several times annually. The president and treasurer were residents of Massachusetts and corporate records and financial books of account were kept there. The court stated that it did not expressly appear but was fairly inferable from the fact that its treasurer's office was there and that its books of account were kept there, that its assets were also kept there. The Massachusetts Court held these acts to constitute doing business within the Commonwealth, which holding as above stated was affirmed by this Court. It makes no difference so far as the legal results of the foregoing activities are concerned whether the holding company was engaged in interstate commerce as well as intrastate commerce. The same principle was applied in the case of Champion Copper Company vs. Massachusetts, decided and reported in Cheney Brothers Co. vs. Massachusetts supra.

The Champion Copper Company case was also decided by the Supreme Judicial Court of Massachusetts and reported in the 218th Mass., at page 557. The Massachusetts Court found that the

Champion Copper Company, a foreign corporation, was doing business in Massachusetts. The facts in that case are fully set out in the Massachusetts report at page 577, and are briefly as follows:

The Champion Copper Company was organized under the laws of Michigan to mine, smelt and refine copper and other minerals and sell the same. It owned a copper mine in Michigan where its copper was mined. Its product was sold exclusively through a selling agent in New York, which represented the company only with respect to making contracts of sale and the collections of purchasers and remitting the proceeds to the treasurer. The deliveries under contracts of sale were exclusively under the direction of the company's treasurer. The Company maintained its treasurer's office in Boston for the purpose of general direction of the deliveries of copper in accordance with contracts made by its sales agent and for the purpose of informing its sales agent as to amounts of copper to be sold and the prices, and for the necessary bookkeeping for the sales and deliveries, and for the deposit of funds received from all sources in Boston and other banks, and the payment of its office expenses and salaries of its officers and the distribution of dividends among its stockholders. In addition to the treasurer's office, the president also maintained his office in Boston, and five of seven directors resided in Massachusetts. Directors' meetings were held in Boston. The com-

pany's mine in Michigan was placed by a vote of the board of directors under the exclusive management of the general manager, resident of Michigan. But the general management and control of all the business and property of the company was vested in its directors in Boston. The Massachusetts court held these activities in Massachusetts constituted doing business within the Commonwealth, and was not interstate commerce. It is perfectly clear from the facts recited and the holding of the Massachusetts Court that the company was engaged in interstate business by selling and delivering copper in states other than Michigan. In other words, the Copper Range Company was engaged in both interstate and intrastate business. The Massachusetts Court further said that it was not necessary to determine whether the exercise by the treasurer over the sales agent and the other instrumentalities of sales constitute interstate commerce, because apart from these considerations the corporate activities conducted at Boston constituted a doing of business which has no direct relation to commerce, and said at page 579:

> "The entire corporate potentiality dwells in the Boston office. Its executive officers are there. The responsibility for its management as a corporation rests upon those whose headquarters are there. Respecting the effects of our excise law upon such state of facts,

> the language of Pembina Mining Company vs. Pennsylvania, 125 U. S. 181, at page 184, is apposite: 'It only exacts a license tax from the corporation when it has an office in the Commonwealth for the use of its officers, stockholders, agents or employees * * *.' The exaction of a license fee to enable a corporation to have an office for that purpose within the Commonwealth is clearly within the competency of its Legislature. Baltic Mining Company vs. Massachusetts, 231 U. S. 68."

The foregoing decision was affirmed by this Court in the Cheney Brothers case, supra. The distinction between the Copper Range Company and Champion Copper Company cases, above discussed, and the Cheney Brothers case is simply this: Cheney Brothers Company was a Connecticut corpotion whose general business was manufacturing and selling silk fabrics. It maintained in Boston a selling office with one office salesman and four other salesmen who traveled through New England. The salesmen solicited and took orders subject to approval by the home office in Connecticut and it shipped directly to the purchasers. No stock of goods was kept in the Boston office, but only samples used in soliciting and taking orders. Copies and records of orders were retained but no bookkeeping was

done and the office made no collections. The salesmen and the Boston office rent were paid directly from Connecticut and the other expenses of the Boston office were paid from a small deposit kept in Boston for the purpose. No other business was done in the State. This distinction was made by this Court in the Cheney Brothers case, supra.

Appellant cites in his argument the case of Norfolk and Western Railroad Company vs. Pennsylvania, 136 U. S. 114, in support of its contention that it is not doing business in Missouri. An examination of the facts in the Norfolk and Western case discloses that its office maintained in Philadelphia was not its main office, but one maintained under its contracts with connecting railroad lines as an office for the solicitation of business. The main office of the company, which was a Virginia and West Virginia corporation, was at Roanoke, Virginia, from whence the business of the railroad was conducted and directed. That case is thus distinguishable from the case at bar. The Norfolk and Western railroad case was considered by this court in the Cheney Brothers case and was cited as an authority in its holding that the Cheney Brothers case was not engaged in intrastate business in the Commonwealth of Massachusetts, at which time and in the same decision this court decided the Copper Range and Champion Copper Company cases, supra, and thus tacitly held that the Norfolk and

Western case was not an authority in point in the two latter cases.

Appellant refers in its argument (Brief p. 54) to the case of Pembina Consolidated Silver Mining and Milling Company vs. Pennsylvania, 125 U. S. 181, which company was a Colorado corporation organized for the purpose of carrying on a general mining and milling business in that state, and maintained an office in Philadelphia, "for the use of its officers, stockholders, agents and employees," and argues that "the tax against the mining company was sustained for the reason that the company was not engaged in interstate commerce" in Pennsylvania.

We can not agree with appellant's construction of the facts in this case. The corporation was clearly engaged in interstate commerce as well as doing business within the State of Pennsylvania. At page 184 of the decision this Court said:

> "It imposes no prohibition upon the transportation into Pennsylvania of the products of the corporation, or upon their sale in the Commonwealth. It only exacts a license tax from the corporation when it has an office in the Commonwealth for the use of its officers, stockholders, agents or employees. The tax is not for their office, but for the office of the corporation, and the use to which it is put is presumably for the latter's business and

interest. For no other purpose can it be supposed that the office would be hired by the corporation.

"The exaction of a license fee to enable the corporation to have an office for that purpose within the Commonwealth is clearly within the competency of its Legislature."

Then again at page 186 the Court said:

"We do not perceive the pertinency of the position advanced by counsel that the tax in question is void as an attempt by the state to tax a franchise not granted by her, and property or business not within her jurisdiction. The fact is otherwise. No tax upon the franchise of the foreign corporation is levied, nor upon its business or property without the state. A license tax only is exacted as a condition of its keeping an office within the state for the use of its officers, stockholders, agents and employees; nothing more and nothing less; and in what way this can be considered as a regulation of interstate commerce is not apparent."

In addition to the foregoing authorities, the decision of the lower court is amply and fully sustained under the facts in the case at bar by the decision of this Court in the case of Baltic Mining Company vs. Massachusetts, 231 U. S. 68. The facts in that

case involved the validity under the commerce, due process and equal protection clauses of the Federal Constitution of an Act of the Commonwealth of Massachusetts imposing an excise tax on foreign corporations within the Commonwealth. The facts there under consideration and the State statute involved are very similar to the facts and the law in the case at bar.

The Baltic Mining Company was a Michigan corporation organized for the purpose of mining, producing and selling copper, and owned a copper mine with equipment in Michigan and had its principal place of business in that State. It had an office in the City of Boston, for the use of its president and treasurer, residing in Boston, for the general financial management and direction of its affairs and for the meetings of its board of directors and the transfer of its stock. The Baltic Mining Company was attempting to do business in Massachusetts and complied with the foreign corporation laws of that State. Its total property and assets amounted to $10,776,000.00, but none of the property was in Massachusetts except current bank deposits and a certificate for $80,000.00 of stock in another Michigan corporation. It engaged in the mining and refining of copper in Michigan, which was sold for delivery in the several states of the United States and in foreign countries. Considerable quantities of the copper were sold for delivery in Massachusetts, as well

as in other states and transported from the Michigan smelter to the producer.

The company brought suit to recover the excise tax of $500.00 imposed by the Commonwealth pursuant to its Excise Tax Act, and paid by the company, and was dismissed by the Supreme Judicial Court of Massachusetts (207 Mass. 381), and this Court affirmed the decision of the State Court. This Court said: (Baltic Mining Company case, supra, at pages 82-83.)

> "The mere fact that a corporation is engaged in interstate commerce does not exempt it from state taxation. United States Express Company vs. Minnesota, 223 U. S. 335, 344. It is the commerce itself which must not be burdened by state exactions which interfere with the exclusive Federal authority over it. A resort to the receipts of property or capital employed in part at least in interstate commerce, when such receipts or capital are not taxed as such but are taken as a mere measure of a tax of lawful authority within the state, has been sustained." Cases cited.

This Court quoted at page 84, with approval the following language from the Massachusetts Court:

> "The required payment is strictly of an excise tax, and not of a tax upon property

> * * * *." This excise tax is for the commodity or privilege of having an establishment for business in Massachusetts, with the protection of our laws and the financial and other advantages of a situation here."

Again at page 85, this Court said:

> "Every case involving the validity of a tax must be decided upon its own facts, and having no disposition to limit the authority of those cases, the facts upon which they were decided must not be lost sight of in deciding other and alleged similar cases."

Quoting further from the same case, at pages 86-7, this Court said:

> "An examination of the previous decisions in this Court shows that they have been decided upon the application to the facts of each case of the principles which we have undertaken to state, and a tax has only been invalidated where its necessary effect was to burden interstate commerce or to tax property beyond the jurisdiction of the State. * * From the statement of facts it is apparent, however, that each of the corporations in question is carrying on a purely local and domestic business quite separate from its interstate transactions. That local and do-

mestic business, for the privilege of doing which the state has imposed a tax, is real and substantial and not so connected with interstate commerce as to render a tax upon it a burden upon the interstate business of the companies involved. In these cases the ultimate contention is not that the receipts from interstate commerce are taxed as such, but that the property of the corporations including that used in such commerce, represented by the authorized capital of the corporations, is taxed, and therefore interstate commerce is unlawfully burdened by a state statute. While the tax is imposed by taking a percentage of the authorized capital, the agreed facts show that the authorized capital is only a part of the corporations respectively. * * * The conclusion, therefore, that the authorized capital is only used as a measure of a tax, in itself lawful, without the necessary effect of burdening interstate commerce, brings the legislation within the authority of the State. So, if the tax is as we hold it to be, levied upon a legitimate subject of such taxation, it is not void because imposed upon property beyond the State's jurisdiction, for the property itself is not taxed. In so far as it is represented in the authorized capital stock, it is used only as a measure of

> taxation, and as we have seen, such measure may be found in property or in the receipts from property not in themselves taxable."

Appellant claims the right of eminent domain within Missouri.

The Supreme Court of Missouri, in the case of So. Ill. & Mo. Bridge Co., vs. Stone, 174 Mo. 1, used the following language at pages 31-2:

> "No doubt whatever exists that as a general rule a foreign corporation has no extra-territorial existence as such, and can exercise none of the rights conferred by its charter outside of the State creating it, except by the comity of the State in which it essays to act or do business. (Bank of Augusta v. Earle, 13 Peters 588; Railroad v. Koontz, 104 U. S. 12.)
>
> "It follows, of course, that foreign corporations are not entitled by their charters to exercise the right of eminent domain, but in the absence of constitutional prohibitions it is competent for the Legislatures of States in which they seek to do business by enabling acts to vest them with this right." Citing cases.

The fact that appellant desires to exercise the right of eminent domain in the State of Missouri

(Record, p. 26) is further evidence of its intention to do business in Missouri when it domesticated there. Without domesticating it could not exercise the right of eminent domain in Missouri. The acts incident to such exercise must be confined to the courts of the State, which acts undoubtedly constitute doing business within the State.

The evidence shows that appellant has maintained litigation in the State courts of Missouri (Record, p. 21), and this activity is likewise doing business within the State. If it were engaged solely in interstate commerce it would not be necessary to domesticate at all in Missouri and its interstate contracts could be enforced in the courts of Missouri.

The amount or extent of the business done within the State is immaterial. If it does any intrastate business at all it is subject to the Franchise Tax Act of Missouri. The tax is not contingent upon the amount of business it does, but is measured by that proportion of its entire capital stock and surplus that its property and assets in this State bear to all its property and assets wherever located.

V. AND VI.

The burden of proof rests upon the appellant and since the chancellor found the facts against appellant in the trial of the cause this court will not reverse the finding unless the chancellor has clearly

misapprehended the facts, which, we respectfully maintain he has not done in this case.

Therefore, in conclusion, it is respectfully submitted that the evidence amply and fully establishes the fact that appellant is and was engaged in business in Missouri, and in view of the authorities above cited and discussed the finding of the lower court is sustained by the evidence and its decree dismising plaintiff's bill should be affirmed.

Respectfully submitted,

JESSE W. BARRETT,
Attorney-General of Missouri,
J. HENRY CARUTHERS,
Assistant Attorney-General of Missouri,
Solicitors, for Appellees.

APPENDIX.

ARKANSAS:

A salesman for an Ohio corporation made a contract to sell computing scales to a grocer at the latter's place of business in Arkansas. He had the scales with him and delivered them at the time. The contract was sent to the District Manager of the Corporation, also located in Arkansas, for approval. This would show that the corporation was "doing business," so as to require its qualification under the laws of Arkansas.

Miellmier vs. Toledo Scale Co., 128 Ark. 211.

CALIFORNIA.

Section 4 C, 190 Statutes, 1915, requires every corporation "now doing intrastate business in this state to procure annually from the Secretary of State, a license authorizing the transaction of such business in this state, and to pay therefor a license tax prescribed herein."

A railroad which begins and ends in Nevada, but which maintains its general office at Los Angeles, is "doing an intrastate business" in California in the sense of this act. At this office the corporation holds its Directors' Meetings, keeps its books, made deposits and disbursements and purchases supplies.

Bullfrog, Goldfield R. Co. vs. Jordan, 174 Cal. 342.

GEORGIA.

Browning was the Agent for a St. Louis corporation on whose behalf he had solicited orders for the sale of lightning rods. The price paid for the rods included the duty of erecting them without further charge. The rods were shipped from St. Louis to Browning and he erected them for the corporation. The court held this to be "doing business" in the City of Way Cross, because the affixing of the lightning rods to the house was merely the doing of a local act after the Interstate Commerce had completely terminated. . . . "

Browning vs. City of Way Cross, 233 U. S. 16.

IDAHO.

Taking title to real estate in behalf of a corporation was the first of a series of acts intended to be done by the corporation in the State. This constitutes "doing business" and is not an "isolated transaction" in the sense in which that term is used in exempting from requirements of qualification. "The cases holding that a single isolated transaction is not to be considered doing or carrying on business within the state or cases where the matter involved was a single transaction without any intention upon the part of the foreign corpora-

tion to continue to transact their acts of business within the state."

Donaldson vs. Thousand Springs Power Co., 29 Ida. 735.

ILLINOIS.

A foreign corporation in holding all of the controlling interest in the stock of an Illinois corporation is held to be "doing business" in Illinois.

Central Life Securities Co. vs. Smith, 236 Fed. 170.

INDIANA.

The act of purchasing real estate to be used by foreign corporations is not an isolated transaction, but constitutes "doing" or "transacting" business in the State. Failure to qualify under the foreign corporation prior to entering such a contract renders it unenforcible against the seller.

Lowenmeyer vs. National Lumber Co., 125 N. E. 67.

KANSAS.

Foreign corporations engaged in interstate commerce in Kansas are required to comply with Section 1293 of the general statutes of 1901, providing that no foreign corporation doing business in this state shall maintain an action in any of the courts thereof

without first filing a sworn statement with the Secretary of State. The court holds that the statute in question is not repugnant to the commerce clause of the Federal Constitution. Action was instituted on a promissory note given in part payment of the purchase price of goods sold to defendant. The sale was on a written order signed by the defendant in Kansas, subject to the plaintiff's approval and taken by the traveling salesman of the plaintiff. The order was sent to the plaintiff at its home office in another state where it was accepted and from which the goods were shipped to the defendant.

Wilson-Moline Buggy Co. vs. Hawkins, 80 Kans. 117.

KENTUCKY.

Investing in timber and mineral lands in the state without attempting to develop them is "doing business" so as to subject the corporation to a license tax.

Green vs. Kentenia Corp., 175 Ky. 661.

MASSACHUSETTS.

In the case of another corporation held to be "doing business" the court reached its conclusion on the facts of the corporation keeping at its office in Boston stock to repair and replace broken parts of machinery. This was held to be local business

separable from its interstate commerce and not within the protection of the commerce clause although the separation might render interstate commerce profitless.

A holding company organized under the laws of a foreign state whose assets are stocks and bonds of a foreign corporation and land located outside of Massachusetts, but which has an office in that state at which it receives and pays dividends, holds Directors' and Stockholders' meetings and keeps its records and financial books of an account is "doing business" in the commonwealth.

A foreign corporation owning a mine outside of Massachusetts and selling its products exclusively outside the commonwealth but which maintains its treasurer's office in Boston for general direction of the deliveries of its products, keeping a record of the sales and deliveries, being solely a distributing division and holding Directors' Meetings is doing business in the commonwealth. The above decisions are decided by the Supreme Court of the United States in the case of Cheney Bros. Co. vs. Commonwealth, 246 U. S. 147.

NEW YORK.

A foreign corporation is not "doing business" in New York when it has no place of business, no office, and no stock of goods in the state and which simply consigns goods to merchants for selling, the

contracts being subject to the approval of the corporation in another state.

Chase-Hackley Piano Co. vs. Griffin, 149 N. Y. Supp. 998.

A foreign corporation, had an office in New York maintained by its stockholders and directors; made a contract for the sale of real property in another state. The contract provided that the deed should be delivered at the New York office and that installments of the purchase price should be paid there during a period of nearly four years. The Supreme Court, Appellate Term, First Department, held the corporation to be "doing business" in the State and denied its aid in enforcing the contract since the corporation had not first obtained certificate of authority to do business. The court said in part, "it is not necessary that a foreign corporation maintain an office in this state in order to transact business here and to come within prohibition of the statute."

Woodbridge Heights Const. Co. vs. Gippert et al., 92 Misc. 204; 155 N. Y. Supp. 363.

The principal office of the Susquehanna Coal Co., a Pennsylvania corporation, is in Philadelphia. It has a branch office in New York, which is in charge of a "Sales Agent," named Peterson. A

suite of offices is maintained in the Equitable Building and the sign on the door is "Susquehanna Coal Co., Walter Peterson, Sales Agent." The salesmen meet daily and receive instructions from their superior. All sales in New York are subject, however, to confirmation by the home office in Philadelphia. All payments are made by customers to the Treasurer in Philadelphia; the salesmen are without authority to receive or endorse checks. The bank account in the name of the company is kept in New York and is subject to Peterson's control, but the payments made from it are for the salaries of the employes and petty cash and disbursements incidental to the maintaining of the office.

The Court of Appeals holds that to do these things is to do business within New York in such a sense as to subject the corporation to the jurisdiction of the courts of New York and render service of process upon its agent valid and binding service upon the corporation.

Tauza vs Susquehanna Coal Co., 220 N. Y. C. of A., 259.

It is now the law of this state that a foreign corporation cannot be sued here unless it is "doing business" in this state, even though plaintiff who seeks to bring suit is a resident or domestic corporation. In the instant case the court holds that the corporation was "doing business" in the state

within the meaning of the provision when it did the following:

"An office was maintained in the state in charge of a person who solicited business for it. The name of the corporation was placed on the office door and upon the stationery used by the person in charge. The rent of the office, stenographer's salary, and the telephone and incidental charges at the end of the month were paid by the corporation. The agent did business on his own account. He had no authority to bind the corporation; but simply submitted inquiries or offers for the corporation to pass upon. The corporation had no bank account or money or property in the State of New York except furniture in the office.

Interocean Forwarding Co. vs. Chas. R. McCormick & Co., 168 N. Y. Supp. 177.

Maintaining a branch office is "doing business." A corporation having a branch office in New York in charge of a general sales manager, employing salesmen in the branch, maintaining a bank account for the benefit of the branch, but in the name of an employee, using a special letterhead for the branch, its name being listed in the telephone book, is "doing business" in New York, so as to require qualification in New York.

Electric Specialty Co. vs. Rosenbaum, 102, Misc. 520; 169 N. Y. Supp. 157.

A corporation which maintains a warehouse in New York from which is delivered goods on contracts signed in New York is "doing business" in the State even though the contracts contain a printed notice that it was subject to approval in Chicago. Such corporation may not sue in New York upon a contract made prior to its qualification to do business as a foreign corporation.

American Can Co. vs. Grassi Contract Co., 102 Misc. 230; 168 New York Supp. 689.

Merely maintaining an office in the State and entering into a contract to be in part performed there, is "doing business" so as to require qualification by a foreign corporation.

East Coast Oil Co., S. A., vs. Hollins et al., 183 App. Div. 67; 170 N. Y. Supp. 576.

OREGON.

A foreign corporation which purchased land in Oregon had the deed recorded, gave a mortgage, leased the property, contracted to sell a portion thereof, and held and voted stock in a local irrigation company, was doing business in Oregon, and having failed to comply with the requirements prerequisite to doing business it was not permitted to sue in an action to compel specific performance. The contention that the transaction was a single isolated instance of doing business in the state was

dismissed by the court after consideration of all the facts, chief of which were that the company had been formed for the purpose of taking over land in question and was doing no other business.

Weiser Land Co. vs. Bohrer, 78 Ore. 202.

TEXAS.

Sale and installation of gasoline containers and pumps is "doing business" in the State, so as to require qualification by a foreign corporation. "The performance of the contract was necessarily to be had in Texas. The employment of state labor and the purchasing of a portion of material in this state for the installation of the machinery furnished appellant was in line with appellee's business and for pecuniary profit. Our conclusion is that the performance of the contract sued upon necessarily required the transaction of business in this state, and, as appellee had no permit to transact business here, the trial court erred in holding that it could maintain this suit."

Bryan vs. Bowser & Co., 209 S. W. 189.

MISSOURI.

A foreign corporation appointing an agent in Missouri to whom goods are shipped on consignment and sold on commission is "doing business" and the contract of agency is void if entered into

before corporation has procured authority to do business.

Farrand Co. vs. Walker, 169 Mo. A. 602.

A Kansas Corporation agreed to establish and conduct a chautauqua at Joplin in consideration of the purchase of a certain number of season tickets by certain persons. It did not comply with Sections 9790, 9791 and 9792, R. S. 1919, requiring the qualification of foreign corporations. For that reason it is not entitled to recover on contracts to purchase these tickets. The plaintiff was not engaged in a mere isolated transaction. It made arrangements with various performers and lecturers to come to Missouri from other states; it erected a tent, sold tickets, conducted the entertainment for a week and advertised it as a permanent affair to return the following summer.

Wichita Film & Supply Co. vs. Yale, 194 Mo. A. 60.

A company shipped brooms into Missouri and sold them from an office here.

"In doing that business it became necessary to employ an agent and to assure his fidelity it was prudent and in keeping with business methods to take from defendant a surety bond and it did so by procuring the one in controversy. We think in such circumstances that obtaining the bond from

defendant was a part of the business it was doing and that in obtaining it plaintiff was prosecuting or doing the business for which it was incorporated."

Having failed to qualify at the time the bond was secured it cannot recover upon it against the Surety Company.

Kelly Broom Co. vs. Mo. Fidelity and Casualty Co., 195 Mo. A. 305.

Plaintiff, a New Jersey Corporation, held a lease upon certain mining property in Jasper County, Missouri, and had done some mining thereon. Defendant, a Missouri corporation, was mining on this same property without the permission of the plaintiff company. Plaintiff filed a bill in equity to enjoin defendant from further operation and mining thereon. Defendant, by way of defense, alleged that plaintiff had not secured a certificate of domestication from the State of Missouri and was therefore not entitled to maintain this action by reason thereof.

The Supreme Court of Missouri, speaking through Judge Graves, at page Twelve, 221 Mo., in discussing the facts and the law, had this to say: "But the question here is, can a foreign corporation come into this state, open up a place of business and actually do a part of the business authorized by its charter, in violation of our law and without taking out a license and otherwise complying with our

statute, have the doors of our courts open to them, to protect the unlawful business? We think not."

The court nisi dismissed the plaintiff's bill in equity on the ground that plaintiff was "doing business" in Missouri without having first secured a license authorizing it so to do. The Supreme Court affirmed this judgment.

Zinc & Lead Co. vs. Zinc Mining Co., 221 Mo. 7.

NEW JERSEY.

A limited partnership organized under the laws of Pennsylvania was held by the Supreme Court of New Jersey, to have all the essential characteristics of a corporation and was treated and held as a corporation by the New Jersey Supreme Court.

This is a Pipe Line Company organized for the purpose of transporting oil and petroleum and its entire business consisted of the transportation of oil or petrolum from points in New York and Pennsylvania to points in New Jersey and the matters incidental thereto. The company contended that it was engaged solely in interstate commerce. The court in passing upon this question said, "but, plainly, the company does business in New Jersey. Here it owns, maintains and operates a pipe line across the state, a pumping station at Change Water, storage tanks, distributing apparatus, and a business office in Bayonne. All this it does as an artificial

entity, distinct from the personal members who brought it into being, claiming the attributes which its Pennsylvania charter confers, and which in our opinion gives it a corporate character. By taxing it as a corporation, the authorities of New Jersey acquiesce in this claim, but require the company to comply with the conditions of such acquiescence.

In this respect the company comes clearly within the intent and meaning of the statute.

The last objection is that the imposition of the tax is an unconstitutional interference with interstate commerce.

According to the facts agreed upon, the entire business of the company consists of transportation of oil or petroleum from points in New York and Pennsylvania to points in New Jersey and of matters incidental thereto, and consequently it seems to be merely interstate commerce.

The tax levied is designated by the statute as "an annual tax for the use of the state by way of a license for its corporate franchise," and consists of eight-tenths of one percentum of "the gross amount of its receipts from the transportation of oil or petroleum through its pipes or in and by its tanks and cars in this state." During the year preceding the levy, the said gross amount being such proportion of its gross receipts for transportation of oil or petroleum over its whole line as the length of its

line in this state bears to the length of its whole line.

The question thus raised is one to be decided according to the views of the Supreme Court of the United States. Those views have been recently expressed in a case which appears to be on all fours with the present case. I refer to Maine vs. Grand Trunk Ry. Co., 142 U. S. 217, which is so apposite for present purposes as to preclude the need or the utility of further investigation.

Upon the authority of that decision I think the objection stated must be overruled.

The tax should be affirmed with costs."

Tidewater Pipe Co. vs. State Board of Assessors, 57 New Jersey 516.

MAINE.

The defendant is a corporation created under the laws of Canada and has its principal place of business at Montreal in that Province. Its railroad in Maine was constructed by the Atlantic and St. Lawrence R. R. Co. under a charter from that state, which authorized it to construct and operate a railroad from the city of Portland to the boundary line of the State; and, with the permission of New Hampshire and Vermont, it constructed a railroad from that city to Island Pond in Vermont, a distance of 149½ miles, of which 82½ miles are within the State of Maine. In March, 1853, that company

leased its rights and privileges to the defendant, the Grand Trunk Railway Co., which had obtained legislative permission to take the same; and since then it has operated that road and used its franchises.

A Statute of Maine enacted that every corporation. . . . . operating a railroad in the State, should pay the State Treasurer, for the use of the State, "an annual excise tax for the privilege of exercising its franchise" in the State, and it provided that the amount of such tax should be ascertained as follows:

"The amount of the gross transportation receipts, as returned to the Railroad Commissioners for the year ending on the 30th of September next preceding the levying of such tax, shall be divided by the number of miles of Railroad operated, to ascertain the average gross receipts per mile; when such average receipts per mile shall not exceed $2,250.00, the tax shall be equal to one-fourth of 1 percentum of the gross transportation receipts . . . . and so on, increasing the rate of the tax one-fourth of 1 percentum for each additional $750.00 of average gross receipts per mile or fractional part thereof . . . When a railroad lies partly within and partly without this state or is operated as a part of a line or system extending beyond a state, the tax shall be equal to the same proportion of the gross receipts in this State, as herein provided, and its amount determined as follows:

The gross transportation receipts of such railroad, line or system, as the case may be over its whole extent, within and without the state shall be divided by the total number of miles operated, to obtain the average gross receipts per mile, and the gross receipts in this state shall be taken to be the average gross receipts per mile, multiplied by the number of miles operated within the state. . . . . .

The defendant, the Grand Trunk Ry. Company, made no returns as a corporation, but it furnished the data and caused the Atlantic and St. Lawrence R. R. Co. to make a return of the gross transportation receipts over its road 149½ miles in length, including the 82½ miles in Maine, for the years 1881 and 1882, and upon this return the governor and council pursuant to the statute ascertained the proportion of the gross receipts in the State, and assessed the tax in controversy accordingly. To recover these taxes as debts due the State, the present action was brought in the Supreme Judicial Court of the State of Maine, and, on application of the defendant, it was transferred to the Circuit Court of the United States. The defendant pleaded nil debet, accompanied with a statement of special matters of defense. By stipulation of the parties, the case was tried by the Court, which held that the imposition of the taxes in question was a regulation of interstate and foreign commerce, in conflict with the exclusive powers of Congress under the Constitution of the United

States and was therefore invalid. It accordingly gave judgment for the defendant, that the plaintiff take nothing by its writ, and that the defendant recover its costs. From that judgment the case is brought to this court on writ of error.

After the above statement of facts Mr. Justice Field delivered the opinion of the court which is in part as follows:

"The tax, for the collection of which this action is brought, is an excise tax upon the defendant corporation for the privilege of exercising its franchises within the State of Maine. It is so declared in the statute which imposes it; and that a tax of this character is within the power of the State to levy there can be no question. The designation does not always indicate merely an inland imposition or duty on the consumption of commodities, but often denotes an impost for a license to pursue certain callings, or to deal in special commodities, or to exercise particular franchises. It is used more frequently, in this country, in the latter sense than in any other. The privilege of exercising the franchises of a corporation within a State is generally one of value, and often of great value, and the subject of earnest contention. It is natural, therefore, that the corporation should be made to bear some proportion of burdens of government. As the granting of the privilege rests entirely in the discretion of the State, whether the corporation be of domestic or

foreign origin, it may be conferred upon such conditions, pecuniary or otherwise, as the State in its judgment may deem most conducive to its interests or policy. It may require the payment into its treasury, each year of a specific sum, or may apportion the amount exacted according to the value of the business permitted, as disclosed by its gains or receipts of the present or past years. The character of the tax, or its validity, is not determined by the mode adopted in fixing its amount for any specific period or the times of its payment. The whole field of inquiry into the extent of revenue from sources at the command of the corporation, is open to the consideration of the State in determining what may be justly exacted for the privilege. The rule of apportioning the charge to the receipts of the business would seem to be eminently reasonable, and likely to produce the most satisfactory results, both to the State and the corporation taxed.

The court below held that the imposition of the taxes was a regulation of commerce, interstate and foreign, and therefore in conflict with the exclusive power of Congress in that respect; and on that ground alone it ordered judgment for the defendant. This ruling was founded upon the assumption that a reference by the statute to the transportation receipts and to a certain percentage of the same in determining the amount of the excise tax, was in effect the imposition of the tax upon such receipts, and there-

fore an interference with interstate and foreign commerce. But a resort to those receipts was simply to ascertain the value of the business done by the corporation, and thus obtain a guide to a reasonable conclusion as to the amount of the excise tax which should be levied; and we are unable to perceive in that resort any interference with transportation, domestic or foreign, over the road of the railroad company, or any regulation of commerce which consists in such transportation. If the amount ascertained was specifically imposed as the tax, no objection to its validity would be pretended. And if the inquiry of the State as to the value of the privilege were limited to receipts of certain past years instead of the year in which the tax is collected, it is conceded that the validity of the tax would not be affected; and if not, we do not see how a reference to the results of any other year could affect its character. There is no levy by the statute on the receipts themselves, either in form or fact; they constitute, as said above, simply the means of ascertaining the value of the privilege conferred.

* * * * * * * * * * *

It follows from what we have said, that the judgment of the court below must be reversed, and the cause remanded, with directions to enter judgment in favor of the State for the amount of the taxes demanded; and it is so ordered.

Maine vs. Grand Trunk R. Co., 142 U. S. 217.